

Town of Concord

APP #39
Application For Building Permit
Small Lots Under The Grandfather
Clause Of G.L. Chapter 40A, § 6

1. Introduction

This Administrative Procedure has been jointly developed by the Town Manager and Town Counsel to set out a procedure to be followed by the Building Commissioner whenever an application is filed for single or two-family residential use of a lot which does not meet zoning requirements for the underlying district.

2. The Law

As land in Concord becomes increasingly valuable, there will be a higher incidence of cases where someone wants to build on a lot which is too small to meet the zoning requirements for the particular zoning district. White Pond is the obvious example, but by no means the only one. An oft-cited basis for a building permit is the so-called "grandfather clause" of G.L. Chap. 40A, § 6¹.

a. The Statute. The working of the statute is the starting point: "Any increase in area, frontage, width, yard, or depth requirements of zoning ordinance or by-law shall not apply to a lot for single and two-family residential use which at the time of recording or endorsement, whichever occurs sooner, was not held in common ownership with any adjoining land, conformed to then existing requirements and had less than the proposed requirement but at least five thousand square feet of area and fifty feet of frontage".

b. Interpretation. The general theory of the statute is to "grandfather" (for single or two-family residential use) a lot on a recorded deed or plan, notwithstanding a subsequent increase in lot size requirements of the ZBL, so long as (1) the lot is not held in common ownership with any adjoining land at the time of the adverse zoning change, (2) conforms to the then existing zoning requirements at the time of the adverse zoning change, (3) has now at least 5000 sq. feet of area and 50 feet of "frontage", and (4) is in a residence zone.

If these conditions are met, the lot meets the requirements for a building permit and may be built upon according to the side yard, front yard and setback requirements of the ZBL as they applied prior to the adverse zoning change. (This has nothing to do with the requirements of the State Sanitary Code, etc. for installation of a septic tank,

¹ There are other provisions of General Laws giving degrees of protection to lots on recorded plans; but these provisions are infrequently applied and give little practical difficulty.

etc. These requirements must still be met on a current basis.) But if there is other land contiguous to the lot in question, and the contiguous land was in common ownership with the lot non conforming, then the contiguous land must be added to the lot. The fact that two lots are shown on a plan with a Planning Board endorsement will not save them (as separate lots) if they are in common ownership at the time of the increased zoning requirement. They must be added together.² Hutnak v. Building Inspector of Uxbridge, Superior Court No. 83-26514, Worcester County, 3/28/84 (Young, J.).

(c) Which plan or deed? The law requires us to look at the most recently recorded plan or deed by which the person claiming "grandfather" rights took title. Thus, if part of a lot which must be added on has been conveyed away, it would seem as if the statutory requirement cannot be met. Hutnak, supra.

(d) Common ownership. We occasionally see cases where an effort has been made to create differing ownership of contiguous lots for the specific purpose of protecting against a later change in the zoning requirement. If two contiguous lots appear, one owned by John Quincy Adams and a second by J. Q. Adams, more investigation will be in order. Or "John Quincy Adams" and "J.Q.A. Realty Trust, by (an attorney) as Trustee".

(e) Date of zoning change. If there is no zoning, then the first zoning requirement may be the key date. An example would be the small White Pond lots as they existed when the area was first zoned in 1928.

(f) Method of claiming the exception. It will be seen that an applicant's right to the statutory grandfather exception must rest upon a careful examination of title plus the establishing of the key date or dates of the zoning changes. This requires an examination of the record title as disclosed by the recorded deeds and plans, plus a zoning by-law history. A simple conclusionary letter from an attorney is not enough. The applicant must submit an abstract of his title, properly certified. A public hearing is necessary in order to give notice to abutters. Both the Building Commissioner and the Planning Board should be involved.

3. Procedure. Whenever an application is made for a residence building permit on a substandard lot, with a claim that the "grandfather" clause applies, the procedure shall be as follows:

(a) The applicant shall be required to provide an abstract of title to establish the claim. The abstract shall contain a certification that it was prepared from the relevant land records, and fully and completely discloses the contents of those records (relying on the standard Registry indexes) for the land in question, together with all contiguous land which was held in common ownership with the subject parcel at any time during the period covered by the abstract. The abstract must go back far enough to reach a

² The Hutnak case was decided under the "grandfather" clause. There are other possible exceptions for lots on recorded plans, but none of them applied in that specific case.

deed from a common source of title (Riley, in the case of White Pond), and then run the locus and the contiguous parcels forward to establish that as of the date of the adverse zoning change (1941, in the White Pond case) there was no common ownership. This kind of title work is lengthy, detailed and expensive; but there isn't any other way to establish the legal conclusion that the grandfather clause applies.

(b) The applicant shall provide a written explanation as to who and why the lot qualifies. This may be an opinion by an attorney, but an attorney's opinion is not a requirement. What is required is a clear and detailed analysis of the "grandfather" clause as applied to the subject parcel, including page citations to the title abstract.

(c) The applicant shall provide a letter from the Town Planner, stating the effective date of the Zoning change which was adverse. This will usually be the date of the Town Meeting.

(d) The applicant shall provide a locus plan, prepared by a registered land surveyor, showing lot area, frontage and the status of the way in which frontage is claimed.

(e) The applicant shall provided a list of names and addresses of all abutters (as shown on the most recent Assessors' records).

(f) The Building Commissioner shall schedule a public hearing on the zoning compliance issue. At least three weeks notice shall be given to all abutters and to the Planning Board.

(g) At the conclusion of the public hearing, if there is any significant doubt in the mind of the Building Commissioner, the application shall be denied. This will then cause the application to be referred to the Board of Appeals. In general, it is not the function of the Building Commissioner to resolve legal arguments or factual disputes. The Board of Appeals is the proper forum for such differences.

(h) When the Building Commissioner either grants or denies an application, immediate written notice of such action shall be given to the Planning Board and all persons who appeared at the public hearing.

(i) If the matter is referred to the Board of Appeals, the Building Commissioner shall forward to the Board a copy of the title abstract and other documentary material in his or her file.

(j) It is important to keep in mind that two things are paramount: 1) To obtain the correct legal result, and 2) to give all parties a sense of complete fairness and procedural due process. Thus, while there may be cases where an opinion from Town Counsel will appear to be a logical step (to resolve matters at the level of the Building Commissioner), these will be the exception. The Board of Appeals provides a forum where all parties can be heard, with clear legal avenues to be followed by anyone who wishes to do so. If the Board of Appeals thinks that it needs input from Town Counsel, the Board may request that the Town Manager authorize it.

(k) Town Counsel will be alert at all times to see that any significant new cases, statutory amendments, etc. are brought to the attention of the Building Commissioner and the Town Planner, so that everyone has a file which is current on the law.

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